

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

76-1275

To be argued by
DANIEL H. MURPHY, II

DOCKET NO. 76-1275

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 76-1275

UNITED STATES OF AMERICA,

Appellee,

-v.-

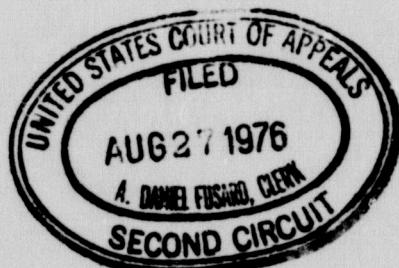
CLARENCE STALLWORTH,

Defendant-Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT
CLARENCE STALLWORTH



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CLARENCE STALLWORTH,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT
CLARENCE STALLWORTH

Issue Presented

Whether overwhelming proof of preparations to commit bank robbery with neither an entry nor attempted entry into bank premises nor an armed assault upon any person will support a conviction of bank robbery.

STATEMENT OF THE CASE

Preliminary Statement

Clarence Stallworth appeals from a judgment of conviction entered on June 18, 1976, in the United States District Court for the Eastern District of New York following a four-day trial before the Honorable John F. Dooling, Jr., United States District Judge for the Eastern District of New York, and a jury.

Indictment 76 Cr. 69, filed on January 29, 1976, charged Stallworth and three others in two counts with attempted bank robbery (18 U.S.C. § 2113 (a)) and with attempted aggravated bank robbery (18 U.S.C. § 2113 (d)). (App. 4). * There was no conspiracy count.

Stallworth moved on April 16, 1976, for an order pursuant to the Due Process Clause of the Fifth Amendment to the United States Constitution and the supervisory powers of the trial court dismissing the indictment for failure to include a conspiracy count or, in the alternative, ruling that after the jury is sworn any later indictment for conspiracy to commit bank robbery based upon the taped conversations of January 20, 21, 22, 23, 1976, of the defendant Stallworth and the other three defendants named in this indictment would be

* Parenthetical references are to the Appellants' Appendix. The Appendix reproduces the pages of the trial transcript with the pagination unchanged. The name of the witness, where relevant, appears in the parentheses.

void on grounds of double jeopardy. (App. 11).* That motion was denied (Tr. 31-35A).

The jury was selected on April 19, 1976 (Tr. 54) and sworn on April 20, 1976 (Tr. 86). Stallworth and the defendant-appellant Johnny Sellers were tried jointly. The Government introduced evidence on April 20, 21, 22, 1976, then rested (Tr. 447). Stallworth renewed his motion to dismiss the second count (Tr. 449); the second count was dismissed (Tr. 492). Stallworth rested at the close of the Government's case (Tr. 485-6, 513). Sellers introduced an affirmative case on April 26, 1976. Neither Stallworth nor Sellers took the stand. Both sides gave their summations and the Court charged on April 26, 1976. The jury found each defendant guilty as charged. (Tr. 613). Stallworth was sentenced to six years in custody on June 18, 1976. He is currently serving his sentence.

Statement of the Facts

Rodney Campbell was the principal Government witness. On January 12, 1976, Campbell entered into an agreement with the Government whereby in return for Campbell's cooperation, he would be granted immunity on four bank robberies he had committed between June and September of 1975 (Campbell Tr. 101).

* The taped conversations had ensued from the cooperation of Rodney Campbell with the authorities. The authorities through Campbell furnished the four defendants with an automobile to use in a bank robbery (Campbell Tr. 108). The automobile was equipped with a recording device (Ibid).

Campbell then contacted Sellers and they discussed Sellers' need for an automobile to use in committing bank robberies (Campbell Tr. 104-5). A car complete with a secreted listening device was furnished Campbell by the FBI (Campbell Tr. 107-8). Campbell, Sellers and other persons (but not including Stallworth) "started riding around casing other banks in Queens." (Campbell Tr. 109-10). This activity began on January 20, 1976, and continued through January 23, 1976. Each day's conversation was recorded (Campbell Tr. 235).

On January 21, 1976, Sellers and Campbell obtained ski masks (Campbell Tr. 114), rubber surgical gloves (Campbell Tr. 115-6), nails and a hacksaw blade (Campbell Tr. 117). On January 22, 1976, they settled on the target bank, The First National City Bank at 154th Street in Queens (Campbell Tr. 119-20, 122-3). Stallworth played no part in any of the preparations until January 23, 1976, the day of the arrest (Court Tr. 236-7).

On January 23, 1976, Campbell, Sellers and the defendant Willie Young, picked up Stallworth (Campbell Tr. 123). The four then joined the defendant Larry Peterson (Campbell Tr. 123-4). Peterson had some band-aids, a sawed-off shotgun (Campbell Tr. 124) and some newspapers (Campbell Tr. 126). Stallworth furnished Young with a .38 revolver (Young Tr. 338, 356). Stallworth was driving (Campbell Tr. 124). They

purchased gasoline (Young Tr. 339) and stuffed newspapers between the seats and on the floor preparatory to burning the car after the robbery (Campbell Tr. 126). They put band-aids on their fingers and put the surgical gloves and ski caps on (Campbell Tr. 127).

The participants drove the FBI car once by the parking lot for the shopping center where the bank was located (Campbell Tr. 127). They then drove around the block and into the lot (Ibid); Sellers got out of the car (Campbell Tr. 130). Stallworth drove out into the street and then returned to the lot (Campbell Tr. 132-3). As the car entered the lot the second time, the surveilling officers locked the doors to the bank (Murphy Tr. 398, 399). The car stopped with its engine running (Campbell Tr. 162). Campbell said "Let's go" to alert the surveillance team (Campbell Tr. 163). Sellers was heading toward the bank (Murphy Tr. 404). The arrest was made before anyone could get out of the car (Murphy Tr. 402). At the time of the arrest, a bank customer was attempting to enter the bank through the locked door (Murphy Tr. 399).

Sellers was let out of the car early to case the area ("He was looking for police and the bank itself for an unexpected guard, or too much traffic in the bank or whatever.") (Campbell Tr. 160).

"Q [Cross-examination]. If you walked down in front of the bank and found all the curtains were drawn on the bank and the door was locked, was he supposed to go ahead and try to rob the bank with you people or not?

"A [Campbell]. I don't think so. I don't know-it didn't happen that way." (Tr. 160-1).

ARGUMENT

WHERE THE FACTS AT TRIAL SHOW NEITHER ENTRY INTO A BANK NOR ATTEMPTED ENTRY NOR AN ASSAULT BUT INSTEAD MERE PREPARATIONS AIMED AT BANK ROBBERY THOSE FACTS CANNOT SUPPORT A CONVICTION FOR BANK ROBBERY.

Stallworth was sentenced to six years on his conviction of attempted bank robbery in violation of 18 U.S.C. § 2113 (a), a 20-year statute. The thrust of this appeal is that the facts even when taken most favorably to the Government, show no more than a conspiracy to commit bank robbery in violation of 18 U.S.C. § 371, a 5 year statute. The facts demonstrate that Stallworth and the others were preparing to rob a bank. Nevertheless, those acts fall short of establishing a violation of the substantive law of attempted bank robbery. To make this argument is not to reason that no crime was proven at the trial. Stallworth admits that the crime of conspiracy to commit bank robbery was proven. However, conspiracy was not charged; instead, the Government charged bank robbery and that alone.

When tested by the higher standard and increased penalties which the Government has selected as the legal framework for this trial, the Government proof fails and the judgment below must be reversed.

Judge Dooling commented below that there is no "fully developed federal law of attempt * * * * the fact is, we are dealing with such an ill-developed law of attempt, that it's hard to figure out just what we are up to."

(Tr. 474). The Court reviewed the basic axioms that mere preparation does not amount to an attempt and that there is a difference between preparation and attempt, but then concluded, correctly we contend on this appeal, "as it turns out, the differences are aligned and drawn on water." (Tr. 478).

It is helpful to start with the fact patterns which federal courts have held sufficient to make out attempted bank robbery. United States v. Bussey, 507 F. 2d 1096 (9th Cir. 1974) (defendants planned to rob bank by kidnapping bank manager from his home and forcing him to open bank vault; defendants with pistol and shotgun entered bank manager's home and accosted him; the defendants were persuaded that time lock would not permit opening of vault until much later time; defendants then left manager's home; defendants waived jury; held judgment of attempted bank robbery affirmed); United States v. Foster, 478 F. 2d 1001

(7th Cir. 1973) (police were notified of a planned bank robbery; bank was placed under surveillance; the two defendants were observed to approach and enter bank and wait in teller's line; they appeared very nervous; one defendant said someone "ratted" or "squealed"; both left bank and were arrested with a loaded pistol, surgical gloves and a trash bag; one of the defendants testified against the other; held makes out offense of attempted bank robbery); Rumfelt v. United States, 445 F. 2d 134 (7th Cir.), cert. denied, 404 U.S. 853 (1971) (defendant wearing mask and carrying loaded carbine and using a bystander as hostage tried to enter bank through door, but door was locked; defendant then left town; defendant was arrested; held attempted entry of bank with intent to commit a felony was established); McClard v. United States, 386 F. 2d 495 (8th Cir. 1967), cert. denied 393 U.S. 866 (1968) (three defendants found in area of bank at 1-3:00 A.M.; they ran when accosted; the bank had been rifled but no money was taken; the boot print of one defendant was found in the bank; held makes out attempted bank robbery); United States v. Hart, 409 F. 2d 221 (10th Cir.), cert. denied, 396 U.S. 825 (1969) (defendants were apprehended inside bank at 2:00 A.M. with acetylene torches, drills, other burglary tools and a gun; held makes out attempted bank robbery); United States v. Bostic, 258 F. Supp. 977 (E.D. Pa. 1966) (two defendants entered bank, one at door and one with bag at counter; a uniformed policeman arrived;

one defendant said "Let's get the hell out of here"; both left; arrested with shotgun and pistol; held no need for positive overt act such as threat or oral command to make out attempted bank robbery); United States v. Baker, 129 F. Supp. 684 (S.D. Cal. 1955) (defendant handed teller a note; teller tripped alarm so that defendant was apprehended; held facts support finding of attempt to commit a crime).

Upon examination of the cases, the common pattern is that the defendants have either entered the bank (Foster, McClard, Hart, Bostic and Baker) or have assaulted a person with drawn gun preparatory to entering the bank (Bussey and Rumfelt). The bi-partite fact pattern reflects the two paragraphs of 18 U.S.C. § 2113 (a). The first paragraph focuses on the means to the robbery, "by force and violence, or by intimidation". The second paragraph focuses on the entry or attempted entry into the bank. In the instant case, we have neither the entry nor the assault. The lack of the assault is underscored by the dismissal of the second count (Tr. 492). A conviction on these facts of bank robbery is unique in the cases. And it is black-letter law that the criminal substantive law is not the place to make new law (see Tr. 462).

It is also axiomatic that hard cases make bad law. Sellers had been involved in a series of bank robberies (Campbell Tr. 227-8). On the day of the arrest, Sellers was carrying a shotgun in working order loaded with roofing

nails to be used as shrapnel (Mortenson Tr. 413). The FBI had gone to considerable time and expense to make this case. The arrest was triggered in part by concern for the safety of bystanders, as well as the safety of the agents (Murphy Tr. 404). Nevertheless, Stallworth does not argue here that no crime was committed; the argument is that the sole crime charged, bank robbery carrying a 20-year penalty (18 U.S.C. § 2113 (a)) was not the crime proven. The crime proven was conspiracy to rob banks carrying a 5-year penalty (18 U.S.C. § 371). The elements proven were an agreement to commit a crime, the entry of Sellers and Stallworth into that agreement and overt acts pursuant to that agreement. The facts showed neither the armed assault nor the entry or attempted entry into the bank premises essential to a conviction of the substantive crime of bank robbery and the harsh and lengthy penalty provided by statute.

The appeal is not from the charge as such. The Court's charge reflected the state of the confused law of attempt as fairly as possible. The appeal is from the denial of the motion by Stallworth for a judgment of acquittal under Rule 29 (Tr. 514).

On the facts proven, the crime of bank robbery has not been established. Therefore, the judgment and six-year sentence of Stallworth must be reversed.

CONCLUSION

The judgment of conviction of Stallworth should be reversed.

Dated: New York, New York
August 27, 1976

Respectfully submitted,

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STATE OF NEW YORK, COUNTY OF NEW YORK
Margaret Nolan

ss:

is over 18 years of age and resides at 475 - 43 St., Brooklyn, N.Y. being duly sworn, deposes and says: deponent is not a party to the action.

Affidavit
of Service
By Mail On August 27, 1976 deponent served the within Appellant Stallworth

upon U. S. Attorney for EDNY, Attn. Paul F. Corcoran, AUSA attorney(s) for Appellee USA in this action, at 225 Cadman Plaza East, Brooklyn, New York 11201 the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office - official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Check Applicable Box

Affidavit
of Personal
Service

On

19 at

upon

herein, by delivering a true copy thereof to the person so served to be the person mentioned and described in said papers as the

the personally. Deponent knew the therein.

Sworn to before me on August 27, 1976

DANIEL J. MURPHY, II
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-2821965
Qualified in New York County
Commission Expires March 30, 1977

DANIEL J. MURPHY, II
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-2821965
Qualified in New York County
Commission Expires March 30, 1977

Margaret Nolan

The name signed must be printed beneath

Margaret Nolan